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No. 94-1696

Supreme Court, U.S.
FILED
JUN 13 1995
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

MAUREEN HANSEN, *et al.*,

Petitioners,

v.

WESTERVILLE CITY SCHOOL DISTRICT, BOARD OF EDUCATION, *et al.*,

Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. ERRORS IN THE FACTS

The brief set of facts supplied to the Court by the Respondents has numerous errors - some small, some significant. All cannot be addressed in the space permitted, but Petitioners do choose to reply specifically to two and will mention several others.

A. THE EVENTS IN THIS MATTER BEGAN BEFORE SEPTEMBER 12, 1988

In the Brief in Opposition the Respondents allege that "(t)he events relevant to this Petition began at a public meeting of the Board on September 12, 1988..." It is indicative of the contest in this case (and most others) that both sides have a perspective. However, it is one thing to state the facts in a manner most favorable to your point of view, it is quite another to leave out, ignore, or misstate facts (either intentionally or unintentionally) in order to create an impression that is clearly at odds with the actual situation.

It should be clear from the arguments and the record in this matter that "the events relevant to this Petition" did not begin on September 12, 1988. The demonstrable events relevant to the Petition herein began the evening of May 27, 1988 - three and one half months earlier that stated by Respondents. May 27, 1988 was the date that Margaret McIntyre[1] (assisted by her son and his girlfriend) was handing out leaflets at the Blendon Middle School in Westerville, Ohio when she was accosted by Respondents Husarik and Hayfield.

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[1] Margaret McIntyre was one of the original Plaintiffs below. She passed away after this case was initiated. Her husband Joseph McIntyre, who is the Executor of her estate, has been substituted as a party herein.

She was told to leave the school grounds[2] and threatened with arrest if she did not comply. Additionally, Respondent Hayfield confiscated some of her leaflets by taking them out of the hands of her son's girlfriend.

Numerous other events[3] took place in that three and one-half month period that are germane to the Petition and the underlying case. These events demonstrate not only the Board's adamant pro-levy position, but it's willingness to use its power and authority to stifle those who oppose its edict. Petitioners believe that this improper use of a position of public trust by those Respondents who are supposed to be "neutral" in their use of authority, is not only an abuse of discretion, but an unwarranted attack on the Constitutional rights of Petitioners and others who disagreed with their point of view.

If the Court were to accept the view of Respondents, then Petitioner Rood's protest at the Board meeting of September 12, would be viewed in a vacuum that would leave

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[2] Respondent Hayfield told Mrs. McIntyre that the leaflets she was distributing were illegal because they did not comply with Ohio Revised Code § 3599.09. Approximately a year late, in March of 1989, Assistant Superintendent Hayfield filed a complaint against Mrs. McIntyre with the Ohio Elections Commission. Eventually Mrs. McIntyre was fined $100.00 by the Commission and contested the constitutionality of the underlying Ohio statute. This Court decided that statute's constitutionality in *McIntyre vs. Ohio Elections Commission*, Case No. 93-986, Decided April 19, 1995.

[3] The use of school facilities by the pro-levy groups. The defeat of two previous levies that year by those opposed to their passage, including the CATW group, many of whom were Plaintiffs below. The refusal by the Board of Education to allow anti-levy groups the same access to, and use of, public school property to display their anti-levy propaganda as the Board had given to the pro-levy groups.

the reader with no understanding of the reasons behind Petitioner Rood's complaint. He would appear to be the person the Respondents have depicted - a demanding citizen who yells and paces about with no purpose other than to disrupt the lawful meeting of the School Board; a base, undesirable lacking sufficient reason to justify his actions. If that picture of Petitioner Rood were accurate, it is highly improbable that Judge Richard Sheward, would have found him not guilty of "disturbing a lawful meeting" and/or "disorderly conduct" based on the judge's review of the videotape of the September 12, 1998 meeting (Joint Exhibit 1 in the courts below) and the Board's own published Agenda for that evening. (Judge Sheward's decision was included as pages 872-894 in the Joint Appendix below).

Respondents' inaccuracies in the facts do not stop with their failure to recognize events that took place prior to September 12, 1988 (which by itself might simply be considered a respondent perspective). There are many others.[4]

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[4] *A.* Respondents' suggest that when Petitioner Hansen attempted to address the Board on September 12, 1988, "(t)he presiding officer at the Board meeting permitted her to complete her remarks." Page 2 of Brief in Opposition. This is inaccurate. She was permitted to continue by Superintendent Husarik. He was not the "presiding officer." The "presiding officer" was Board President Don Miller.

B. On Page 3 of their Brief in Opposition, Respondents state that at the October 24, 1988 meeting "Dr. Miller also reiterated the ground rules for participation." Presumably the "ground rules" refers to the fact that there would be 45 minutes allotted for public comment and that each speaker would be permitted no more than five minutes to speak. Respondent Miller did not reiterate the ground rules that night. (R. 44, Jt. Ex. 2).

C. On Page 3 the Respondents refer to "...a new public participation policy which opened the floor for public comment for forty-five minutes and required those in attendance to state their desire to speak on a sign-up sheet available prior to the meeting." The "sign-up sheet" was a "new

Most may be considered small, relatively inconsequential errors, but the totality of the mistakes changes the view one receives of the events in question and certainly colors the truth.

B. THERE WAS NO SEPTEMBER 12, 1988 "MEETING"

Respondents on Page 18 state that "Officer Tiburzio testified that the only 'meeting' he ever had with a Board member was a brief conversation immediately prior to the September 12, 1988 meeting, which was before the change in the public participation policy." (Emphasis in quote in Brief in Opposition.) They cite Pages 61 and 73-75 of Respondent

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rule" created by Don Miller and imposed on October 10, 1988. It was not a "new public participation policy" approved by the Board. The forty-five minute time frame, on the other hand, was not new. It had been used before. It was the same time-frame that was in existence during the September 12, 1988 meeting. (R. 44, Jt. Ex. 1).

D. On Pages 4 and 11 Respondents refer to Del Waggoner as a "Petitioner." Del Waggoner is neither a Petitioner nor has he ever been a Plaintiff below.

E. On Page 4 Respondents state that "(b)oth in and outside the auditorium, Petitioner Rood struggled with Officer Tiburzio..." This statement is incorrect. There is no indication anywhere in the record that Officer Tiburzio had any contact with Petitioner Rood outside of city counsel chambers.

F. Respondents state on Page 5 that "(a)fter the Petitioners returned from the foyer, the final speaker recognized by the Board, Jack Sandman, was completing his statement. At that time, despite the announcement that the public comment period was closed, Petitioner Hansen approached the podium, began to speak, and refused to yield despite being ruled out of order." In reality, Petitioner Hansen did approached the podium, a considerable time after Jack Sandman had completed his statement, not as he "was completing his statement." In fact, there was an interim discussion by the Board that took a couple of minutes once Mr. Sandman stopped talking, before Mrs. Hansen stood and asked for additional time to address the Board. R. 44, Jt. Ex. 1.

Tiburzio's Deposition for support of this statement. However, no place in the material cited does Tiburzio suggest that he spoke with Dr. Husarik as far back as September 12, 1988. Quite the contrary. Tiburzio indicated that he contacted Dr. Husarik the first night he reported for duty at a school board meeting. (Tiburzio Depo. at 75, lines 13-15.) Tiburzio did not say what the date was of that meeting. He did not remember. He only knew it was the first night he reported for duty.

Respondent Tiburzio was asked in deposition if he was at the September 12, 1988 meeting, and if he escorted Mr. Rood out of that meeting. His response was as follows: "I never escorted Mr. Rood out of any other meeting [other than the October 24, 1988 meeting]." Tiburzio Depo. at 64, lines 5-6. Tiburzio simply was not at the September 12, 1988 meeting. R. 44, Jt. Ex. 2.

II. ARGUMENT CONSIDERATIONS FROM THE BRIEF IN OPPOSITION

Petitioners have set forth their arguments for the granting of a writ in their Petition and do not desire to repeat them here simply because Respondents have offered contrary explanations. However, there are three points raised by the Respondents to which Petitioners wish to reply.

A. TIBURZIO'S DISCUSSION WITH HUSARIK

It is clear from Tiburzio's deposition that he had a conversation with Ernest Husarik in which the two discussed Tiburzio's duties at the school board meetings. (See Petition at Pages 13, *et seq.*) Respondents allege that Respondent Tiburzio's "testimony is perfectly consistent with that of Dr. Husarik, who stated that he had not spoken with Officer

Tiburzio prior to the October 24, 1988 Board Meeting." Page 19 of Brief in Opposition.

Petitioners are at a loss to understand how Respondents find no inconsistency in that statement. Perhaps it revolves around their mistaken belief that the conversation between Respondents Husarik and Tiburzio took place just prior to the September 12, 1988 meeting and that the word "prior" in Husarik's statement meant only "immediately before" the October 24, 1988 Board meeting and not a day before, or a week before or longer. Respondents even accuse Petitioners of "misstating the record" by "Petitioners' attempt to impute the brief discussion before the September 12 meeting to the October 24 meeting..." Page 19 of Brief in Opposition.

There is no evidence to suggest a meeting or "conversation" between Respondents Husarik and Tiburzio before the September 12, 1988 School Board Meeting, but, if such a conversation took place, it would support Petitioners' theory since it would tend to show Respondents' attempt to gain tighter control over speakers even before a supposed reason for doing so existed.[5]

B. THE THEORY OF CONSPIRACY

Respondents suggest that Petitioners' theory of conspiracy requires a chain of events over which Respondents had no control. Page 21 of Brief in Opposition. Petitioners' point is that Respondents were in complete control and had planned for the two most obvious contingencies - one, that the

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[5] The protest by Petitioner Rood on September 12, 1988 could arguably be cited by Respondents as a basis for instituting new or additional controls (i.e. new rules). Absent that protest, there appears to be little reason in the record for a concern that the meetings might become difficult to manage.

Petitioners would not protest the Board's unfair rulings which kept the CATW leaders from having an opportunity to speak, or, two, that they would. If Petitioners did not protest, then the Board could control or stack this very important meeting with those speakers they desired, without any opposition. If Petitioners did protest, the Board was in a position to discredit them. It is a very simple theory which is supported by reasonable and legitimate inferences from the facts coupled with the denials and contradictions in the testimonies of Respondents Husarik, Tiburzio and Miller.

Why did Dr. Husarik insist that there was no meeting between he and Officer Tiburzio? Such a meeting would certainly not have been unusual. Even what Officer Tiburzio indicated that Dr. Husarik told him was not necessarily out of the ordinary. What was out of the ordinary was the denial by Respondent Husarik that the meeting or conversation ever took place. What was out of the ordinary were the statements by Officer Tiburzio that described what Dr. Husarik wanted done with Petitioners Huffman and Rood. (See Footnotes 15 and 16 in the Petition at Page 14.)

What was out of the ordinary was Respondent Miller's "new rule" at the October 24, 1988 that gave preference to those who had not spoken before. That "new rule" effectively eliminated an opportunity for the three anti-levy speakers (Petitioners Huffman, Rood and Hansen) that Respondent Don Miller had recognized on his own personal notes (prepared before the meeting) to be the most probable anti-levy participants, from speaking. That same "new rule" curiously allowed virtually everybody listed in Don Miller's notes as pro-levy speakers, an opportunity to be heard in Respondent Miller's pre-determined order. (See Don Miller's Notes at Page A-59 of Petition Appendix.)

What was out of the ordinary was Don Miller's trial testimony which demonstrates that he had an understanding of what was to happen when Officer Tiburzio entered the council chambers after being summoned in by Dr. Husarik. (See Footnote 17 in Petition beginning on Page 15.)

Nor does Petitioners' theory of conspiracy rely on "their proclivity for disruptive behavior" as alleged by Respondents. The only "proclivity" Petitioners had was their proclivity to exercise their First Amendment rights. That proclivity was well known by the Respondents but not appreciated because Petitioners were on the "wrong" side.

C. THE SIXTH CIRCUIT'S SUMMARY JUDGMENT STANDARDS

Respondents argue that because Petitioners do not disagree with the basic summary judgment standards enunciated by the Sixth Circuit Court of Appeals, that there is nothing in the lower court's ruling that is defective or inconsistent with the decisions of this Court and the granting of a writ would be inappropriate. Petitioners, of course, do believe that the decision of the court below recited the proper standards. The quarrel of the Petitioners, as delineated in their Petition before this Court, is clearly over the application of those standards.

Even where the standard quoted is correct, the incorrect application may cause an untoward result. If nothing is done to right an incorrect application, it will be used indiscriminately over and over again to bring about multiple injustices in a myriad of situations.

Petitioners believe that the facts in this case do not simply represent an academic or episodic set of circumstances

that have no important overtones for future determinations by courts throughout this country. Quite the contrary, the failure by any court to properly consider all of the facts in any situation or to make a ruling based on any incorrect assumption or an incomplete consideration of the facts and the circumstances, causes irreparable harm, not only to the parties involved (and disproportionately to plaintiffs), but to the system of justice itself and the rights of citizens everywhere to significant Constitutional guarantees. Petitioners maintain that the facts in this case speak more poignantly in favor of the granting of a writ of certiorari than those in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970).

III. CONCLUSION

For the reasons delineated in the Petition and hereinabove, Petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

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